KANMANI v. SUNDARAMPILLAI

[O. C. J. (Smith J.) April 16, 1957]

[K. L. — Divorce Suit No. 11 of 1956]

Divorce — Domicil of origin — Change of domicil — Burden of proof.

Where a domicil of origin is proved, the onus of establishing that there has been a change of domicil lies upon the person who asserts it, and he must be able to shew such a change of domicil with perfect clearness and satisfaction.

Where, therefore, a petitioner seeks to establish such a change, the Court must treat with great reserve the statements of the petitioner and the respondent. It is safer to establish the respondent's intention from all the surrounding circumstances and particularly from events which occurred *ante litem motam.*

Case referred to:—

(1) *Winans v. Attorney-General* (1904) A.C. 287.

DIVORCE PETITION.

R. P. S. Rajasooria for the petitioner.

D. G. Ironside for the respondent.

Smith J. : — In this petition for divorce the question of jurisdiction has been tried as a preliminary point. For the Court to have jurisdiction it is necessary for the petitioner to prove that at the time when she presented her petition she was domiciled in the Federation. This means that she must prove that at that time the respondent, her husband, was domiciled in the Federation.

The basic facts are that the respondent came to this country from Ceylon at about the age of seventeen years in 1923 in order to get work. His parents were then living in Ceylon and remained there until their death. There is no doubt that at that time the respondent had a domicil of origin in Ceylon. He obtained employment shortly after in the Railway Department. He was retrenched in 1932 and later re-employed and continued in the service until he was boarded out on medical grounds in June, 1956, his accrued leave expiring in December, 1956. In 1938 he went on leave to Ceylon and returned the next year. He did not visit Ceylon after the war. Last month he obtained a travel document to Ceylon.

The points at issue are whether the respondent has at any time acquired a domicil of choice in the Federation and, if so, whether he has lost it. The latter point can be quickly disposed of. If the respondent acquired a domicil of choice in this country before he went to Ceylon in 1938 there is nothing to indicate that by going to Ceylon on leave in 1938 he left this country for good. Assuming that after his return from Ceylon in 1939 he either had or has since acquired a domicil of choice in this country, he has not lost that domicil because, even if he had the *animus* to return to Ceylon, he has not in fact yet left the Federation and has therefore not lost his domicil of choice (see *Dicey's* Conflict of Laws, 6th edition, Rule 8(2) at page 98). The point for decision is whether the respondent has at any time acquired a domicil of choice in this country.

The case of *Winans v. Attorney-General*[1] is authority for the proposition that where a domicil of origin is proved, it lies upon the person who asserts a change of domicil to establish it (*per* Earl of Halsbury L.C. at page 288). At page 291 Lord MacNaghten speaks of the "heavy . . . burden cast upon those who seek to shew that the domicil of origin has been superseded by a domicil of choice" and he quotes with approval the *dictum* of Lord Westbury that the person alleging the change must be "able to shew that (i.e. the change) with perfect clearness and satisfaction".

I accept *in toto* the evidence of Mr. Velauthan (R.W. 2) who impressed me as a witness to the truth. I realise that as a railway colleague of the respondent he might be expected to favour the respondent, nevertheless, I am satisfied he did not exaggerate. He has known the parties since their marriage in 1940 and has stated that the respondent never had any intention of staying in this country and has told him so many times in the past few years and also before. This evidence is not conclusive that at some time the respondent had not formed the *animus* to settle permanently in this country.

From the pleadings and from the evidence given before me it is clear that for many years past matrimonial relations between the parties had been strained (see e.g. para (a) of petitioner's particulars of cruelty). The evidence adduced by the petitioner suggests that the respondent wishes to separate from her. The fact that the respondent has for the past two years or more had an intention to return to Ceylon and separate from his wife and family is not conclusive proof that he always intended to return to Ceylon. Mr. Rajasooria has argued that only since the commencement of these proceedings has the respondent shewn any desire to return to Ceylon and that he has obtained a "travel document" merely to support his case. The letter at page 10 of the Bundle of Correspondence shews me clearly that on 25th July, 1956 the petitioner was aware that the respondent intended to go to Ceylon.

I agree with both learned counsel that in this case the Court must treat with great reserve the statements of the petitioner and the respondent and that it is safer to establish the respondent's intentions from all the surrounding circumstances and particularly from events which occurred before these or any proceedings were contemplated. In considering whether change has

occurred "any act, event or circumstance in the life of an individual may be evidence from which the state of his mind may be inferred . . . . ". (7 *Halsbury*, 3rd edition page 19 para. 35).

In favour of change of domicil the petitioner points to long residence in this country: the respondent came to this country as a youth in 1923, and has returned once only to Ceylon in 1938 for the purpose of his first marriage. Such long residence may be conclusive in the absence of explanatory circumstances — see 7 *Halsbury op. cit.* page 20 paragraph 37. It is in Mr. Velauthan's evidence that not all the Tamils who come from Ceylon to earn a living make this country their permanent home. The respondent has given evidence that he came here in the first instance to gain his living if he could. I do not regard long residence in Malaya by a Jaffna Tamil in government service as conclusive evidence of change of domicil. It must be supported by other evidence.

The petitioner next points to the fact that when the respondent was retrenched in the depression of 1932 he did not return to Ceylon. The respondent was not cross-examined upon his failure to return to his native land nor was any evidence led by the petition to shew that conditions in Ceylon were at that time no worse than in Malaya or that the respondent could afford to return or that the respondent, having been retrenched, was unable to find work. From this circumstance nothing can be deduced.

Thirdly, the petitioner calls attention to the fact that the respondent nominated Kuala Lumpur as the place of payment under his insurance policies. I think some weight can be attached to this but it must also be borne in mind that if he had nominated a place in Ceylon as the place of payment, had he died suddenly the widow might have experienced delay in getting payment in the Federation. I accept the respondent's explanation that he thought he would experience no difficulty in getting payment elsewhere than the Federation.

Fourthly, the respondent has not returned to Ceylon since the war. This I regard as the most important point in the petitioner's favour. The respondent says the reason was that the petitioner did not wish to go. That statement, unsupported by evidence, I regard as dangerous to accept. I note that his parents were dead which would remove the principal inducement for him to go to the expense of the voyage and, secondly, his brother was here already.

Fifthly, the respondent, says the petitioner, apparently intended his children to be educated here and has no intention of taking them with him to Ceylon. The fact that the children have been educated here up to the present is explicable on economic grounds. The fact that he does not intend to take them to Ceylon appears to me either to go to shew that he is an unnatural parent or that he regards them as so attached to their mother that it would be cruel to part them. I can see no pointer towards the respondent's intentions in his attitude towards his children and their education.

Finally, the petitioner alleges that the respondent has close association with a temple in Sentul and has expressed an intention to devote his life to it. Apart from the evidence given by the petitioner and her children on this point, Mr. Seviris Abpuhamy (P.W.2), whose evidence I accept, said that when drunk the respondent had expressed an intention to live in the temple. Another witness, Mr. Valliapa Konar, (P.W.4) said he had met the respondent, apparently since the latter retired and that he told him he was living with his brother at Seremban or in the temple. This witness, who was a former part-time servant to the parties when they were still living together, professed ignorance about their matrimonial difficulties. His evidence revealed no permanent intention in the respondent to devote his life to the temple. No temple officials were called by the petitioner. I did not consider that she had proved this point.

The respondent in support of his assertions points first and foremost to the fact that he has made no attempt to secure a permanent dwelling in the Federation. There was some unsatisfactory and inconclusive evidence about a land purchase scheme shortly after the war in which government servants appear to have been dabbling in land speculation through nominees. It was suggested, but not supported by a shred of evidence, that he had an interest in a house now being built in Seremban and a share in a small business.

Secondly, the respondent has made no attempt to take out Federal citizenship. The petitioner attempted to discount this by suggesting that railway employees only take out citizenship in the hope of getting promotion. I agree that that is probably one element in becoming a citizen but, nevertheless, I consider that a person qualified to become a citizen who wished to reside permanently would automatically try to become a citizen particularly if there were hope of his getting promotion. The petitioner became a citizen in 1952 but the respondent did not. I am satisfied that that fact alone proves that in 1952 the respondent had no intention to make Malaya his permanent home, though it does not negative the possibility that previously he had intended to do so or that subsequently he changed his mind.

Reviewing the evidence in this case as a whole I find myself in the position of the Earl of Halsbury L.C. in *Winans case*, *supra* at page 289 where he says:—

"I must admit that I have regarded the whole history of Mr. Winans life differently at different stages of the

argument and the conclusion I have come to is that I cannot say that I can come to a satisfactory conclusion either way; but then the law relieves me from the embarrassment which would otherwise condemn me to the solution of an insoluble problem, because it directs me in my present state of mind to consider upon whom is the burden of proof. Undoubtedly it is upon the Crown, and, as I cannot bring myself to a conclusion, either way, whether Mr. Winans did or did not intend to change his domicil, his domicil of origin must remain, ... ".

In this case the burden of proof is upon the petitioner and she has not discharged that burden. It appears to the Court that the domicil of the parties at the time when the petition was presented was in Ceylon and that the Court accordingly has no jurisdiction. The petition is therefore dismissed with costs for the respondent.

One final remark I wish to make. Counsel for the petitioner made a moving appeal relative to the hardships suffered by the petitioner which went more to the substance of the petition upon which I have heard no evidence than upon the preliminary point of domicil. There can be no doubt that there are extremely hard cases occasioned by the fact that a wife has the domicil of her husband but that is no reason for relaxing standards of proof. The remedy lies in express legislation as in the United Kingdom relating to divorce petitions by "G.I. brides" . No doubt if a good case exists the legislature will extend the jurisdiction of the Court to receive the petition of a wife who is a Federal citizen and resident here even though her husband is domiciled outside the Federation. One must not forget, however, that one hard case will not necessarily make good law.

Petition dismissed.

Solicitors: *R. P. S. Rajasooria; Lovelace & Hastings.*

R. C. H. LIM & Co. v. M. LEE

[O. C. J. (Taylor J.) May 25, 1956]

[Singapore — Suit No. 1672 of 1955]

Rules of the Supreme Court, 1934, O. 14 — Appeal against Registrar's order granting leave to enter judgment — Final judgment drawn and entered — Whether can be set aside.

Costs — Solicitor conducting his own litigation.

The plaintiffs are a firm of solicitors who have acted for the defendant, a real estate developer, in many transactions over a long period. A large sum in respect of fees having been outstanding for some time, the plaintiffs issued a specially indorsed writ for $16,000. The defendant in person entered an appearance to the writ. The plaintiffs issued a summons for final judgment under R.S.C., O. 14, r. 1, which came before the Registrar who allowed an adjournment at the defendant's request to enable him to file an affidavit. On the defendant's failure to file such an affidavit and to attend on the resumed date the Registrar made an order granting leave to the plaintiffs to enter final judgment. The defendant gave notice of appeal from this order. The final judgment was drawn up and entered but there was no application for the judgment to be set aside.

Held: (1) the appellant should be put as nearly as possible in the position in which he would have been if he had made his whole case at the proper time but on terms, especially as to cost;

(2) if the order giving leave to enter the judgment is set aside, the judgment itself must also be set aside, otherwise the whole proceedings would be abortive;

(3) a judgment cannot be set aside except on a process expressly seeking that relief; as the appellant had not specifically applied to set aside the judgment he must amend his notice of appeal by adding a prayer that the judgment be set aside, and subject to that, both the order of the Registrar and the judgment would be set aside;

(4) if an appellant alleges an error in law or a wrong exercise of discretion he should ask the Registrar to record the reasons for his decision and these should be put on the file before the matter comes before a Judge.

Where a solicitor conducts litigation on his own behalf he is entitled to ordinary professional costs except for certain items which are inapplicable in fact, for instance, he cannot attend upon himself.

Cases referred to:—

(1) *Spira v. Spira* (1939) 3 All E.R. 924.

(2) *Evans v. Bartlam* (1937) 2 All E.R. 646.

(3) *Nash v. Rochford Urban Council* (1917) 1 K.B. 393.

APPLICATION adjourned into Court for further argument.

C. F. J. Ess for the plaintiffs.

R. H. Green for the defendant.

Taylor J. : — This is an application by Summons which was adjourned into Court for further argument.

The plaintiffs are a firm of solicitors who have acted for the defendant, a real estate developer, in many transactions over a long period. A large sum in respect of fees having been outstanding for some time, the plaintiffs issued a specially endorsed writ for $16,000. The defendant in person entered an appearance to the writ. The plaintiffs issued a summons for final judgment. The affidavit shows that this was under O. 14, r. 1. The summons came on for hearing before the Registrar on 30th January last; the defendant attended in person; he had not filed any affidavit and did not disclose any defence to the actual claim but he said that he had a counter-claim and asked for an adjournment to enable him to file an affidavit stating the relevant facts. The Registrar accordingly adjourned the matter to 3rd February. On that day one of the plaintiffs, acting as solicitor for his own firm, attended. The defendant did not attend and he had not filed any affidavit. The Registrar granted leave to enter final judgment. The defendant personally saw the Registrar later on the same morning and learned of the order. He then instructed solicitors and on 7th